FILED
OCT 31 1980

Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners,

v.

TERRI LEE HALDERMAN, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF *AMICI CURIAE* AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, MENTAL HEALTH ASSOCIATION, ASSOCIATION FOR RETARDED CITIZENS—CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION, AND MENTAL HEALTH LAW PROJECT IN SUPPORT OF RESPONDENTS

MARGARET F. EWING
PAUL R. FRIEDMAN
Mental Health Law Project
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
Introduction	5
I. IN AN EXERCISE OF ITS SPENDING AUTHORITY, CONGRESS CONDITIONED THE RECEIPT OF DD FUNDS UPON EACH STATE'S AGREEMENT TO PROTECT THE RIGHT TO APPROPRIATE HABILITATION OF PERSONS RECEIVING SERVICES UNDER ASSISTED PROGRAMS	7
A. In Enacting the DD Act, Congress Intended to Promote Community Alternatives to Institutional Care	7
B. The DD Act Provides Funds to States for the Coordination of Federally Assisted Programs to Provide Community Alternatives	10
C. To Ensure the Use of Community Alternatives, Congress Expressly Recognized in Section 6010 of the DD Act a Right of Developmentally Disabled People to Receive Appropriate Least Restrictive Habilitation	14
D. The DD Act's State Plan Requirements in Section 6063 Obligate Each Participating State to Provide Appropriate Habilitation in Its Assisted Programs	15
II. IN ORDER TO OBTAIN FUNDS UNDER THE DD ACT, PENNSYLVANIA AGREED THAT IT WOULD PROTECT THE RIGHT TO APPROPRIATE HABILITATION OF PERSONS RECEIVING SERVICES IN ASSISTED PROGRAMS	17

TABLE OF CONTENTS—Continued

Page

A. Pennhurst Is Part of Pennsylvania's Mental Retardation Program, Which Is a "Program" Within the Meaning of Subsection 6063(b)(5)(C) 18

B. Pennsylvania's Mental Retardation Program Is "Assisted" Under the DD Act Within the Meaning of Subsection 6063(b)(5)(C) 21

III. PENNSYLVANIA AND THE COUNTIES VIOLATED THEIR OBLIGATION TO PROVIDE RESPONDENTS WITH APPROPRIATE HABILITATION WHEN THEY CONFINED THEM IN PENNHURST STATE HOSPITAL 22

IV. RESPONDENTS HAVE A PRIVATE CAUSE OF ACTION TO ENFORCE STATE PLAN REQUIREMENTS BOTH UNDER THE DD ACT AND UNDER 42 U.S.C. § 1983, AS CONSTRUED IN *MAINE* v. *THIBOUTOT* 23

A. Respondents Have an Implied Cause of Action Under the DD Act in Accordance With the Criteria Established in *Cort* v. *Ash* 23

B. 42 U.S.C. § 1983 Provides a Remedy for the Enforcement of Rights Secured by the DD Act 25

C. Congress Did Not Intend Federal Fund Cut-Offs for Noncompliance With State Plan Requirements to Be the Exclusive Means of Enforcing Obligations Under the Act 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Page

Bossier Parish School Bd. v. *Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) 24

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 27, 29, 30

Conn. State Dep't. of Public Welfare v. *HEW*, 448 F.2d 209 (2d Cir. 1971) 16

Cook v. *Ochsner Foundation Hosp.*, 319 F. Supp. 603 (E.D. La. 1970) 24, 28

Cort v. *Ash*, 422 U.S. 66 (1975) 23, 24

Corum v. *Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973) 24

Euresti v. *Stenner*, 458 F.2d 1115 (10th Cir. 1972) 24

Gomez v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969) 24, 28-29

Halderman v. *Pennhurst State Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1978), *aff'd*, 612 F.2d 84 (3d Cir. 1979) .... *passim*

Hoolick v. *Retreat State Hospital*, 24 Pa. Commonw. Ct. 218, 354 A.2d 609 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978) 21

King v. *Smith*, 392 U.S. 309 (1968) 16

Lau v. *Nichols*, 414 U.S. 563 (1974) 16

Lloyd v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977) 24, 29

Maine v. *Thiboutot*, —— U.S. ——, 100 S. Ct. 2502 (1980) 5, 23, 25, 26, 29, 30

New York State Association for Retarded Children v. *Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973) 8

North Carolina ex rel. Morrow v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978) 16

NYC Coalition for Community Health v. *Lindsay*, 362 F. Supp. 434 (S.D.N.Y. 1973) 30

Oklahoma v. *Civil Service Comm.*, 330 U.S. 127 (1947) 16

Parham v. *J.L.*, 442 U.S. 584 (1979) 29

TABLE OF AUTHORITIES—Continued

Page

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 27, 30
Rosado v. *Wyman*, 397 U.S. 397 (1970) 16, 27
Saine v. *Hospital Authority of Hall County*, 502 F.2d 1033 (5th Cir. 1974) 24
Thiboutot v. *Maine*, 405 A.2d 230 (S. Jud. Ct. Me. 1979) 30
Wyatt v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974) 8

United States Constitution

Article I, Section 8 15
Fourteenth Amendment 15, 24

Statutes and Regulations

12 U.S.C. § 1701 11
20 U.S.C. § 1232 9
20 U.S.C. § 1401, *et seq.* 9, 11
20 U.S.C. § 1681, *et seq.* 28
28 U.S.C. § 1331 26
29 U.S.C. § 31 *et seq.* 9
29 U.S.C. § 49h 28
29 U.S.C. §§ 701-794 ..... 9, 11, 28
42 U.S.C. § 291 28
42 U.S.C. § 300k 9, 16
42 U.S.C. § 604 29
42 U.S.C. § 1381 *et seq.* 10
42 U.S.C. § 1396 *et seq.* 13
42 U.S.C. §§ 1397-1397f 9, 11
42 U.S.C. § 1437 11
42 U.S.C. § 1983 ..... 3, 5, 23, 25, 29
42 U.S.C. § 6000 *et seq.* ..... *passim*
42 U.S.C. § 6000(a)(5) 9
42 U.S.C. § 6010 ..... 14, 15, 16, 17, 19, 23, 26, 28
42 U.S.C. § 6010(3) 9, 12, 13, 29
42 U.S.C. § 6011 ..... 15, 16
42 U.S.C. § 6012 28
42 U.S.C. § 6063 ..... 15, 16, 19, 27

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 6063(b)(2)(A)	17, 18
42 U.S.C. § 6063(b)(5)(C)	16, 17, 18, 21, 23, 26, 30
42 U.S.C. § 6065	27
42 U.S.C. § 6067	12
45 C.F.R. § 1386.61 (1978)	12
45 C.F.R. § 1386.80 (1978)	27
PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969)	4, 20
Legislative Authorities	
S. Rep. No. 160, 94th Cong., 1st Sess. (1975)	8, 9
H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. Code Cong. & Ad. News 961	28
H.R. Rep. No. 94-58, 94th Cong., 1st Sess. 10 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 924	12
H.R. Rep. No. 95-1188, 95th Cong., 2d Sess. 9-10, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7364	12
1963 Public Papers of the President 126, 134; 109 Cong. Rec. 1832, 1841 (1963)	8
121 Cong. Rec. 16,516 (April 10, 1975)	7, 8
124 Cong. Rec. S 15,663 (*daily ed.*, Sept. 21, 1978)	8, 28
Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973: Hearings on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. (1973)	8
Testimony of the Secretary of Health and Human Services: Departments of Labor, Health, Education, and Welfare, and Related Agencies, Appropriations for 1981: Hearings Before a Subcomm. on Appropriations, 96th Cong., 2d Sess. 641 (1980)	10, 11, 13
1966 Pa. Legis. J. 3d Spec. Sess. No. 33, 76 (Sept. 27, 1966)	20

TABLE OF AUTHORITIES—Continued

Page

Other Authorities

CAPALLI, R., RIGHTS AND REMEDIES UNDER FEDERAL GRANTS (1979) 16

Commonwealth of Pennsylvania's Governor's Budget, 1979-1980 20

GENERAL ACCOUNTING OFFICE, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY (1977) 14

Intagliata, J., *Cost Comparison of Institutional and Community Based Alternatives for Mentally Retarded Persons*, 17 Mental Retardation 154 (1979) 14

Kaufman, *The Formation of a Learning Set in Institutionalized and Non-Institutionalized Mental Defectives*, 67 Am. J. Men. Def. 601 (1963) .. 8

Pennsylvania Developmental Disabilities Plan (1979) 19, 21, 22

Pennsylvania Developmental Disabilities Plan (1980) 21, 22

Rubin, *An Economic Analysis of Litigation and Legislation for the Handicapped*, in BUREAU OF ECONOMIC RESEARCH, DISABILITY AND HEALTH ECONOMICS RESEARCH (1976) 14

Sternlight & Siegel, *Institutional Residence and Intellectual Functioning*, 12 J. Men. Def. Res. 119 (1968) 8

Stimpson et al., *Effects of Early Institutionalization on Growth and Development of Young Children with Down's Syndrome*, 67 Mich. Med. 1213 (1968) 8

Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant Type Assistance Programs*, 46 Geo. W.L. Rev. 159 (1978) .. 16

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations of mental retardation and mental health professionals, citizens and lawyers concerned with the legal rights of mentally retarded people to receive appropriate services.[1] *Amici* have in common a strong commitment to the provision of educational, residential, medical and social services to mentally

---

[1] Henceforth in this brief, *amici* will include:

(1) The American Orthopsychiatric Association, an interdisciplinary organization of 4,000 members including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior;

(2) The National Association of Social Workers (NASW), with chapters in all 50 states and the District of Columbia; the largest professional association of social workers in the world. More than one-third of its 83,000 members are engaged in providing health and mental health care services in public, voluntary and private institutional and outpatient settings throughout the country. NASW is devoted to the establishment and maintenance of high standards of professional practice and to the advancement of sound public policy for consumers of social work services. Promotion of community-based alternatives to institutionalization and support for the legal rights of patients and residents of institutions are among NASW's priorities for the 1980s;

(3) The Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better services for the mentally disabled;

(4) The Association for Retarded Citizens—California, a voluntary organization of 24,000 members devoted to promoting the welfare of mentally retarded children and adults;

(5) The American Civil Liberties Union, an organization of 200,000 members engaged in defense of the principles in the Bill of Rights;

(6) The Mental Health Law Project, a nonprofit public-interest organization established in 1972 to protect the legal rights of mentally handicapped persons. MHLP has represented thousands of mentally disabled persons in individual cases and class action lawsuits establishing fundamental rights and has assisted other attorneys throughout the country in upholding the rights of their mentally handicapped clients.

retarded persons in settings which are as normal and conducive to the exercise of personal freedom as possible. While the nature of such settings will vary according to individual educational and therapeutic needs, *amici* believe that mentally retarded citizens need—and Congress intended them to have—a maximum opportunity to develop their potential for intellectual and personal growth and for the exercise of constitutionally protected liberties.

As organizations composed of thousands of professional members, *amici* draw on the extensive experience of practitioners who daily strive to provide mentally retarded and other developmentally disabled people with effective programs and services. *Amici* organizations also include mentally retarded consumers, their parents and lawyers, who are continually engaged in efforts to secure those services. *Amici* believe that developmentally disabled children and adults gain intellectual, social and physical skills more readily in small, homelike settings integrated into ordinary community life around them than they do in large, impersonal institutional settings. In fact, *amici* believe, for vast majority mentally retarded people institutional life is affirmatively harmful. In an institution, the regimented routine, the anonymity born of being one of hundreds, the isolation from family, friends and normal role models and the lack of opportunity to participate in common neighborhood affairs further retard the residents' already impaired ability to learn daily living skills, to develop meaningful personal relationships and to live self-sustained lives. Therefore, *amici* support the goal of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (hereinafter the "DD Act") to expand needed community alternatives to institutional care.

Amici do not categorically oppose the use of institutions for certain mentally retarded persons, provided the state can demonstrate that their physical and mental condition is so impaired that they could not exercise their civil liberties if placed in a less restrictive setting and

could not profit intellectually or emotionally from a more normal environment. In this case, until individual evaluations of all Pennhurst residents have been completed (as ordered by the Third Circuit Court of Appeals), the number of residents, if any, who could remain at Pennhurst is unknown. Therefore, the character of Pennhurst's residents, the way the institution would serve its reduced population and the nature of its programs are all undetermined. This Court need not decide at present whether such an undefined Pennhurst must be closed.

Consents from both petitioners and respondents to the filing of this brief have been filed in this Court.

SUMMARY OF THE ARGUMENT

The question in this case is whether residents of Pennhurst State Hospital, mentally retarded persons receiving services through a program assisted under the DD Act, have a right under that Act to receive appropriate habilitation in the least restrictive setting.[2] *Amici* maintain that the Pennhurst residents do have such a right and that both the DD Act and 42 U.S.C. § 1983 provide them a remedy for its enforcement. Therefore, *amici* urge the Court to affirm the Third Circuit's ruling requiring the petitioners to provide each respondent with a competent professional assessment of his or her habilitation needs. This Court should also affirm the Third Circuit's ruling requiring petitioners to provide each respondent with suitable community living arrangements and with other appropriate habilitation services outside Pennhurst except where petitioners can demonstrate that certain residents can receive better services at Pennhurst.

1. The plain language of the DD Act, its overall scheme and its legislative history demonstrate a strong

---

[2] The term habilitation is used herein to refer to the education, training and care required by mentally retarded individuals to reach their maximum development. *Halderman* v. *Pennhurst State Hospital*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1978), *aff'd*, 612 F.2d 84, 95 (3d Cir. 1979).

congressional intent to require states receiving federal funds under the Act to conform existing public programs for mentally retarded people to meet their needs both for appropriate services and for maximum liberty and autonomy. When it enacted the DD Act in 1975 Congress understood the harms mentally retarded people suffer from unnecessary confinement in large public institutions. Knowing that the vast majority of mentally retarded people have potential for intellectual and social growth and that such potential can best be developed in community settings, Congress passed a law to promote the use of community alternatives to institutionalization. To attain this goal, Congress exercised its constitutional spending authority to create a state grant-in-aid program which (1) provides funds to the states to coordinate their existing federally assisted and other programs to better serve mentally retarded persons; (2) recognizes the right of developmentally disabled persons to receive appropriate habilitation in the least restrictive setting; and (3) creates an obligation on the part of states accepting funds under the Act to protect this newly recognized right.

2. Pennsylvania applied for and received funds under the DD Act. As a condition to receiving those funds from the federal government, the Commonwealth agreed to protect the right to habilitation of developmentally disabled persons receiving services in programs assisted under the Act. Pennhurst residents are such persons. The Commonwealth operates a statewide comprehensive mental retardation program, established pursuant to Pennsylvania's Mental Health and Mental Retardation Act of 1966, which is assisted under the DD Act. The program has annually received funds under the DD Act to defray the cost of planning, securing and evaluating mental retardation services, including those provided by the state's mental retardation program. The state acknowledges that Pennhurst is an integral part of that program. As persons served in a component of the state's

program thus assisted, residents of Pennhurst have a right to appropriate habilitation enforceable against the state.

3. The record in the case leaves no doubt that the Commonwealth and its counties failed to provide appropriate habilitation to residents of Pennhurst. It is essentially unchallenged on appeal, that conditions at Pennhurst were "abominable" and "deplorable" and that they precluded any effective programming or services to improve the plight of the residents.

4. Because residents of Pennhurst have a right under the DD Act to receive appropriate habilitation from the Commonwealth and because Pennsylvania failed to provide it, those residents have a cause of action both under the DD Act itself and under 42 U.S.C. § 1983 for its enforcement. Each of the criteria for implying a private cause of action is met with respect to the DD Act. Moreover, like the plaintiffs in *Maine* v. *Thiboutot*, —— U.S. ——, 100 S. Ct. 2502 (1980), respondents in this case are beneficiaries of a federal-state grant-in-aid program seeking to enforce federally required state plan provisions against the state. This Court held in *Thiboutot* that federal enforcement provisions in the Social Security Act were not exclusive and that Section 1983 provides a remedy for the private enforcement of such rights. The same should be true in this case, especially in light of Congress' express recognition of respondents' right under the DD Act.

The Court should affirm the order of the Third Circuit Court of Appeals.

ARGUMENT

Introduction

Amici herein recognize that the scope and nature of the Court's decision in this case will have a profound effect upon mental disability law and upon the lives of hundreds of thousands of mentally disabled persons in our

country. *Amici* have joined together out of a common interest in the promotion of community-based services for mentally retarded children and adults and a concern that the Court's decision in this case speak directly and positively to the limited issues presented.

In this case, it is indisputable that the Commonwealth of Pennsylvania has received federal funds under the DD Act; that Pennsylvania operates a statewide mental retardation program; that Pennhurst State Hospital is an integral part of that program; that respondents are residents of Pennhurst; and that at the time of trial Pennhurst did not provide appropriate habilitation to its residents. The limited question presented is whether residents of Pennhurst have a right under the DD Act to receive appropriate habilitation outside of Pennhurst from the Commonwealth of Pennsylvania.

Accordingly, in order to rule on the holding of the court of appeals below, this Court need *not* decide:

1. Whether developmentally disabled persons who are not served by a state receiving funds under the DD Act have a right to habilitation under the Act;

2. Whether developmentally disabled persons who are not served by a program assisted under the DD Act have a right to habilitation under the Act;

3. Whether the DD Act requires the closure of Pennhurst as it may exist in the future. (The record does not now indicate the number of residents, if any, who will be found to need placement in Pennhurst, the kind of programs to be provided them or the future condition of the physical environment.)

4. Whether residents of Pennhurst have rights under other laws or the Constitution of the United States which support the relief ordered by the court of appeals.

Amici believe that other issues discussed in the court of appeals' dissent, but which need not be decided in order to resolve the instant case, should not be addressed

by the Court. If the Court were to find that respondents do not have a right to habilitation in the least restrictive alternative under the DD Act or Pennsylvania law, this case should be remanded to the court of appeals for its consideration of alternative grounds supporting the district court's orders. Because those alternative grounds have not been raised or briefed by the parties in this Court or ruled on by the court of appeals, they should not be decided by this Court at this time. Rather these issues should await decision in future cases, when they must be decided in order to render a holding on the merits.

I. IN AN EXERCISE OF ITS SPENDING AUTHORITY, CONGRESS CONDITIONED THE RECEIPT OF DD FUNDS UPON EACH STATE'S AGREEMENT TO PROTECT THE RIGHT TO APPROPRIATE HABILITATION OF PERSONS RECEIVING SERVICES UNDER ASSISTED PROGRAMS.

A. In Enacting the DD Act, Congress Intended to Promote Community Alternatives to Institutional Care.

When it enacted the DD Act, Congress was aware of the harms of institutionalization and intended to promote the use of less restrictive alternative habilitation services. Congress had become increasingly concerned about the large numbers of mentally retarded persons being confined in public institutions where they were subjected to inhumane conditions[3] and inappropriate treatment,

---

[3] . . . Over the last two years the Committee on Labor and Public Welfare has taken testimony or received reports of: inappropriate admissions because of lack of community services, inappropriate and inhuman experimentation with residents, sterilizations and other operations performed for convenience of treatment, starvation and malnutrition, abuse and physical punishment and inadequate food and living conditions, and death.

121 Cong. Rec. 16,516-17 (June 2, 1975) (remarks of Senator Williams).

Similar findings regarding inhuman conditions in the nation's large retardation institutions were made by several federal courts

where their liberty was unnecessarily restricted[4] and where their disabilities were aggravated.[5] President Kennedy had implored the nation that "we must move from the outmoded use of distant custodial institutions to the concept of community-centered agencies." 1963 Public Papers of the President 126, 134; 109 Cong. Rec. 1832, 1841 (1963).

While the overwhelming weight of professional opinion expressed to Congress supported the provision of community residential care and services to persons inappropriately placed in institutions, there was an acknowledged lack of community facilities available in which to place them.[6] To remedy this situation, in 1975 Con-

---

and specifically regarded by Congress as the wrongs to be righted by the new Act. *Wyatt* v. *Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *New York State Association for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752, 756 (E.D. N.Y. 1973). *See* 121 Cong. Rec. 16,516-17 (April 10, 1975); 124 Cong. Rec. S 15,663 (*daily ed.*, Sept. 21, 1978).

[4] The prevailing professional opinion expressed to the Congress during its hearings on the DD Act was to the effect that mental retardation is not a deviance or a disease, but an impairment in learning capacity and adaptive behavior which can be improved through education and training. *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973:* Hearings on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 1973. This concept, known as the developmental model, was adopted by Congress as one of the principles underlying the 1975 Bill of Rights provisions in the Act. S. Rep. No. 160, 94th Cong., 1st Sess. 28 (1975) (hereinafter "S. Rep. No. 94-160").

[5] Stimpson, *et al., Effects of Early Institutionalization on Growth and Development of Young Children with Down's Syndrome*, 67 Mich. Med. 1213 (1968); Kaufman, *The Formation of a Learning Set in Institutionalized and Non-Institutionalized Mental Defectives*, 67 Am. J. Men. Def. 601, 604 (1963); Sternlight & Siegel, *Institutional Residence and Intellectual Functioning*, 12 J. Men. Def. Res. 119, 123 (1968).

[6] *See generally Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973:* Hearings on S. 427 and S. 458

gress enacted the DD Act to provide states with funds to plan, coordinate and evaluate the development of community-based services as alternatives to institutionalization.[7] Congress also adopted a bill of rights provision expressly granting developmentally disabled people a right to receive appropriate habilitation in the least restrictive setting. Finally, as a condition to receiving DD funds, Congress required that each participating state protect that expressly provided right in all programs assisted under the Act.

Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. (1973).

[7] The Senate Committee, reporting on the 1975 Act placed "high priority" on "utilization of community resources and alternatives to institutionalization." S. Rep. No. 94-160 at 16. Although the Act provides standards for residential programs, Section 6010(3) and (4)(A) and (B), they should not be construed as implying congressional approval of traditional large public institutions. S. Rep. No. 94-160 at 32-33 (1975). On the contrary, they represent an effort to require that residential programs be appropriate to the needs of their residents—something Congress believed large institutions like Pennhurst were not. Thus the Act proclaims: "It is in the national interest to strengthen specific programs [for developmentally disabled people] especially programs that reduce or eliminate the need for institutional care." 42 U.S.C. § 6000(a)(5).

A policy favoring deinstitutionalization has also been embodied in other major legislation, including amendments to the Vocational Rehabilitation Act in 1964 and 1968, 29 U.S.C. §§ 31 to 35, 37, 38, 41 to 41c, 42-1 to 42b (1976) (providing group residences and services for retarded persons); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976) (requiring rehabilitation services for more severely disabled persons); Social Services Amendments of 1974, 42 U.S.C. §§ 1397-1397f (1976) (setting deinstitutionalization as a goal); Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-1420, 1453 (1976) (assuring public education for children with special needs); National Health Planning and Resource Development Act of 1975, 42 U.S.C. 300l, 300k-2 (1976) (setting deinstitutionalization as a national health priority).

B. The DD Act Provides Funds to States for the Coordination of Federally Assisted Programs to Provide Community Alternatives.

It is clear from the terms of the Act and its legislative history, that Congress intended that federal funds for services to mentally retarded people—more than 3.5 billion dollars in 1981 and commensurate amounts in previous years [3]—be used to provide appropriate habilitation to the mentally retarded population in noninstitutional settings. The Act was not intended to provide a new funding source for the operation of needed services for mentally retarded persons. Rather, it was a source of funds for the planning, coordination and marshaling of existing public programs and funding sources to provide appropriate services.

By 1975, Congress had already enacted a number of social welfare and benefit programs which, properly utilized, provided large sums of money to finance the cost of community services to mentally disabled people. These programs included Supplemental Security Income, Vocational Rehabilitation, Education for All Handicapped Children, the social services program of Title XX of the Social Security Act, Medicaid and others. They provide federal funds for the operation of a wide variety of residential, educational, medical and social services utilized by developmentally disabled people outside of institutions.[9] In 1979, HEW spent almost $2.8

---

[8] *Testimony of the Secretary of Health and Human Services: Special Reports, Departments of Labor, Health, Education, and Welfare, and Related Agencies Appropriations for 1981:* Hearings Before a Subcomm. on Appropriations, 96th Cong., 2d Sess. 641-674 (1980) (hereinafter "HHS Special Report").

[9] The major federal programs currently providing significant noninstitutional services to mentally retarded people include the Supplemental Security Income program under the Social Security Act, providing maintenance income to mentally disabled people, 42 U.S.C. §§ 1381 *et seq.*; the Title XX social services program providing funds for foster care, day activities programs, social work counseling and referral services, as well as grants for the establish-

billion to serve mentally retarded people alone through such programs.[10] The states spend billions more.

Congress saw no need to spend more money for direct services. It desired, instead, to see that funds already available were properly used to provide appropriate services. Congress clearly indicated that it intended to use the leverage of additional federal funds provided by the DD Act to influence a broad range of service programs. In its 1975 report, the Committee on Interstate & Foreign Commerce stated its intention to reach the entire spectrum of programs:

> The developmental disabilities program itself provides only approximately one percent of all the funds available from Federal, State and local sources for services of various kinds to the developmentally disabled. *The intent of the State formula grant provisions of the 1970 Act was to provide for more effective planning* by the States of their programs. . . . A program which provides only one percent of available funds must have its impact through *improving the effectiveness and efficiency of the use of the rest of available funds.*

---

ment of small facilities, 42 U.S.C. §§ 1397 *et seq.*; the Medical Assistance program under Title XIX of the Social Security Act, providing funding for residential facilities for as few as four persons to provide intermediate care for mentally retarded people, as well as funds for habilitation services such as physical therapy, psychiatric counseling and physicians' services, 42 U.S.C. §§ 1396 *et seq.*; the Vocational Rehabilitation program, providing evaluations of employment potential, prevocational and vocational training and sheltered employment placement, 29 U.S.C. §§ 701 *et seq.*; the Education for All Handicapped Children Act, providing funds to public school systems for special education programs to meet the needs of mentally as well as physically handicapped children, 20 U.S.C. §§ 1401 *et seq.* (1975); and housing programs providing federal subsidies to support the development of special sheltered congregate-living arrangements for the mentally handicapped, 42 U.S.C. § 1437(f), 12 U.S.C. § 1701(1).

[10] HHS Special Report, *supra.*

H.R. Rep. No. 94-58, 94th Cong., 1st Sess. 10 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 924 (emphasis added).[11]

Again in 1978, Congress re-emphasized this leveraging principle underlying the legislation:

> When Congress originally passed the Developmental Disabilities Act in 1970, the legislation was seen as a planning, coordinating and gap-filling mechanism which would assist consumer representatives, service providers, and responsible state officials to make rational sense of the growing array of Federal and State programs to finance and deliver services to a target population of some of the most severely handicapped persons in our society. In essence, the program was intended to be *a catalyst—to weld into a cohesive, client centered thrust the expanding number and types of specialized and generic programs with responsibility for assisting developmentally disabled individuals.* The program was to serve as the *glue* to hold together all the major structural components of a comprehensive, lifelong program for developmentally disabled persons.

H.R. Rep. No. 95-1188, 95th Cong., 2d Sess. 9-10, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7364 (emphasis added).

Congress' intention to establish in the DD Act requirements to be enforced in other federally assisted programs is made clear by Section 6010(3) of the Act. It provides:

---

[11] Indeed, the coordination of federal, state and local programs was seen as an essential task of the state planning councils created by the Act. 42 U.S.C. § 6067; 45 CFR § 1386.61 (1978).

The Planning Council, through its activities under the DD Act, can avoid duplicating services, financing inappropriate services and failing to provide essential services for the developmentally disabled population. It is inevitable that the programs represented on Pennsylvania's Planning Council (among them the state's mental retardation, medical assistance, vocational rehabilitation and special education programs) benefit from and are assisted by the DD Act's planning mandate.

> The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that (A) does not provide treatment, services, and habilitation which are appropriate to the needs of such persons; or (B) does not meet the following minimum standards: . . .

42 U.S.C. § 6010(3). This prohibition applies to the expenditure of all state and federal funds, not just those provided by the DD Act. This section is evidence of Congress' intention to use the DD Act to affect the states' use of other federal funds, such as those provided for special education, vocational rehabilitation and Medicaid —all of which provide some funds for residential services. This same purpose is evident in the state plan requirements which impose upon participating states an obligation to protect the right to appropriate habilitation in such programs when those programs are assisted under the DD Act.

Contrary to petitioners' contention, the federal government is a true financial partner with the states in the provision of services to mentally retarded people. It contributes billions of dollars annually to the states, including Pennsylvania, to provide such services.[12] Rather than placing a "massive burden" upon the states and providing no funds to meet it, the DD Act requires those states which accept DD funds for the coordination of existing federally funded programs to take action in accordance with the plans the Act pays to develop. Congress was not interested in paper exercises. It wanted and demanded assurances from participating states that they would conform federally assisted services to congressional objectives. Furthermore, the court of appeals noted that the development of suitable community living arrangements in Pennsylvania will impose little, if any, financial burden on the state and counties. The district

---

[12] HHS Special Reports, *supra*, at 643.

court found that the per-patient cost in a community living arrangement is less than at Pennhurst, and this finding was not challenged on appeal. 612 F.2d 116 n.39.[13]

C. To Ensure the Use of Community Alternatives, Congress Expressly Recognized in Section 6010 of the DD Act a Right of Developmentally Disabled People to Receive Appropriate Least Restrictive Habilitation.

Deploring the wasted human potential and the unjustified denial of freedoms caused by unnecessary institutional confinement, and intent upon promoting the use of alternatives, Congress added the Bill of Rights to the DD Act in 1975. 42 U.S.C. § 6010. These provisions state

> Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. 42 U.S.C. § 6010(1).

The "appropriate habilitation" to which the Act establishes a right is not an absolute concept, but one which takes into account two important personal interests—the therapeutic and the civil libertarian. The Act thus defines habilitation as those services which are both "designed to maximize the developmental potential for the person" and which are "provided in the setting least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2).

The concept of appropriate habilitation is one of a spectrum or continuum of services, each suited to dif-

---

[13] Studies indicate that community care systems not only benefit retarded people more, both intellectually and socially, but are also less costly, or at least no more expensive, than institutional care. *See, e.g.*, Intagliata, *Cost Comparison of Institutional and Community Based Alternatives for Mentally Retarded Persons*, 17 Mental Retardation 154 (1979); GENERAL ACCOUNTING OFFICE, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY 5-6 (1977); Rubin, *An Economic Analysis of Litigation and Legislation for the Handicapped, in* BUREAU OF ECONOMIC RESEARCH, DISABILITY AND HEALTH ECONOMICS RESEARCH 102 (1976).

ferent degrees of disability and different sets of needs. At one end of the spectrum are large institutions; at the other end are small group homes or supervised independent apartment programs and an array of nonresidential community support services. Congress meant to entitle all developmentally disabled people, not to a particular place in the spectrum, but to those services which would best meet each individual's developmental needs.[14]

Apart from the enforceability of the rights recognized in Section 6010 standing alone, those rights are clearly made enforceable by the Act's Section 6063 state plan requirements. These requirements obligate the states to protect those rights.

D. The DD Act's State Plan Requirements in Section 6063 Obligate Each Participating State to Provide Appropriate Habilitation in Its Assisted Programs.

The mechanism Congress selected to effectuate the right to appropriate habilitation was the familiar state grant-in-aid program. Exercising its spending authority to provide for the general welfare under Article I, Section 8 of the Constitution, Congress offered the states planning funds in exchange for a commitment to carry out congressionally declared objectives—*i.e.*, the state's commitment to coordinate and utilize its assisted programs to provide appropriate habilitation in the least restrictive setting.[15] This Court has made it clear that "[t]here is, of course, no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose terms and conditions upon which

---

[14] 42 U.S.C. § 6011.

[15] As the Third Circuit noted, recognition of the DD Act as an exercise of spending authority is in no way inconsistent with the bill of rights provisions' also being an exercise of Congress' authority under Clause 5 of the Fourteenth Amendment. 612 F.2d at 99.

its money allotments to the states shall be disbursed." *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968).[16]

The terms and conditions imposed upon states accepting federal funds under the DD Act are contained in the state plan requirements in Section 6063 of the Act. Section 6063 of the Act requires each recipient state to obligate itself in its state plan to, among other things, (1) determine the services needed by persons with developmental disabilities which are provided or will be provided by federal-state programs, (2) provide that services are delivered in an individualized manner consistent with the Act's requirements for individualized habilitation plans in Section 6011 and (3) assure that the rights of developmentally disabled people to appropriate habilitation secured by the Act's bill of rights provision (in Section 6010) will be protected.[17] Taken together, these state plan requirements create obligations on the part of the states corresponding to the rights granted by Sections 6010 and 6011 of the Act to developmentally disabled people served in state-assisted programs.

Subsection 6063(b)(5)(C) of the Act mandates that the state's plan provide for the protection of the right to appropriate habilitation in the least restrictive setting:

---

[16] *See, e.g., Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970); *Oklahoma* v. *Civil Service Comm.*, 330 U.S. 127, 142-43 (1947). In *Lau*, this Court again confirmed that "the Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed." *See also Conn. State Dep't. of Public Welfare* v. *HEW*, 448 F.2d 209, 215 (2d Cir. 1971) (Social Security Act grant-in-aid programs, 42 U.S.C. §§ 600 *et seq.*); *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978) (National Health Planning and Resources Development Act (1978) (National Health Planning and Resources Development Act, 42 U.S.C. §§ 300k *et seq.*). *See generall*, R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 28-34 (1979); Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant Type Assistance Programs*, 46 Geo. W.L. Rev. 159 (1978).

[17] Subsections 6063(b)(2)(A) and (B) and (b)(5)(B) and (C).

> The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under the *programs assisted under this chapter* will be protected consistent with section 6010 of this title (relating to rights of developmentally disabled) (emphasis added).

The obligations created by subsection 6063(b)(5)(C) thereby accrue to persons who receive services "under the 'programs assisted' under [the Act]."

II. IN ORDER TO OBTAIN FUNDS UNDER THE DD ACT, PENNSYLVANIA AGREED THAT IT WOULD PROTECT THE RIGHT TO APPROPRIATE HABILITATION OF PERSONS RECEIVING SERVICES IN ASSISTED PROGRAMS.

Petitioners, the Commonwealth of Pennsylvania, applied for and received funds from the federal government under the Developmental Disabilities Act in 1977, 1978, 1979 and 1980. As discussed above, in order to obtain those funds, the Act required Pennsylvania to assure the Secretary of Health and Human Services that it would protect the rights of "all persons with developmental disabilities . . . who are receiving treatment, services or habilitation under programs assisted under the Act consistent with Section 6010 (the bill-of-rights provisions)." Subsection 6063(b)(5)(C).[18] The respondents are such persons. They currently receive at least some, albeit inadequate, services at Pennhurst, which is part of

[18] Under the terms of Subsection 6063(b)(5)(C), states assure that the rights of certain persons will be protected. Where the Commonwealth provides services through contractual and other arrangements with its counties, it must require the counties to abide by the conditions which bind the state. Consequently, in this case, the obligations incumbent upon the Commonwealth by virtue of its state plan assurances are also incumbent upon the counties which participate in the state's mental retardation program.

the state's mental retardation program assisted under the Act.

A. Pennhurst Is Part of Pennsylvania's Mental Retardation Program, Which Is a "Program" Within the Meaning of Subsection 6063(b)(5)(C).

Petitioners contend that assisted programs are only those facilities that directly receive funds under the Act. Pet. Brief, at 16. However, the "programs assisted" under the Act must refer to broad statewide service programs rather than narrow, individual operating facilities. These state plan requirements would be rendered meaningless if "programs" mentioned in Section 6063(b)(5)(C) did not signify statewide service programs. The term is used in its broad sense, to include statewide programs, in the preceding provisions of the same section, where Subsection 6063(b)(2)(A) requires the state to list the programs it will use to meet its designated objectives, and Subsection 6063(b)(2)(B) requires the state to describe such "Federally assisted State programs as the State conducts relating to education for the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services and comprehensive health and mental health," which will be used to provide services to developmentally disabled people in the state. It is reasonable to assume, then, that the term "program" as used in Subsection 6063(b)(5)(C) again means statewide service programs.

Moreover, a more restricted reading of the term "assisted program" to mean only those programs directly receiving funds appropriated under the DD Act is contrary to the expressed intent to condition DD funding upon the states' willingness to provide individualized habilitation plans and appropriate habilitation in state-operated programs. Indeed, if the state's obligations to provide services meeting federal standards, to provide individualized services and to protect the rights of developmentally disabled people are construed to run only with

direct DD funding, the Act is made a mockery. It would obligate the states to respect the rights of only those very few developmentally disabled people who are served by university-affiliated programs or by model demonstration programs.[19] Surely Congress did not labor so hard to bring forth such a mouse.

Congress, *amici* believe, had larger objectives in mind when it established these state plan requirements. It meant to require states which accept federal planning money to respect the rights of developmentally disabled people in all of the state's programs assisted through the planning, evaluation and coordination efforts funded by the Act. Whatever the reaches of such assistance might be in other cases, in this case the Commonwealth's own mental retardation program was clearly such an assisted program.

By its own acknowledgment, respondent Commonwealth of Pennsylvania maintains a single statewide mental retardation program intended to provide a wide variety of services to developmentally disabled persons. As set forth in its 1980 Developmental Disabilities Plan:

> The legal base for [Pennsylvania's] mental retardation program is the Mental Health and Mental

---

[19] Under such a narrow interpretation of Section 6063, if a state desired to completely defeat the individual rights granted in § 6010, it could allot all of its DD Act funds to nonservice activities, such as those which promote public awareness projects and personnel training. Even when DD Act funds in any given year *are* designated to a program that provides treatment, habilitation or service, because of the nature of the Act there is no assurance that the funding will attach to the program in subsequent years. If direct DD funding were the key to § 6063's required assurances, a resident in a community living arrangement facility which might directly receive DD Act funds in 1979 would lose his right to receive appropriate treatment in the least restrictive environment if the DD monies were directed elsewhere in 1980. Under this reading, the rights established by Congress would attach and pass away on a mere change of bookkeeping entries. The Congress could not have meant these rights to be so transient or so easily evaded by recipient states.

> Retardation Act of 1966, which charges the Department of Public Welfare with the duty to assure within the state the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them regardless of religion, race, color, national origin, settlement, residence or economic or social status.

Pennsylvania Developmental Disabilities Plan, 1980 at 191. Under the Mental Health and Mental Retardation Act of 1966, the counties and the state share administrative and financial responsibility for providing comprehensive services to all mentally retarded people in the state.[20]

The legislative history of the 1966 Act indicates that the Pennsylvania legislature believed that it was creating "the framework of a program which will provide a continuum of services" to the state's mentally handicapped. Remarks of Senator Pechan, 1966 Pa. Legis. J. 3d Spec. Sess., No. 33, 76 (Sept. 27, 1966). The Commonwealth's share of the cost of operating Pennsylvania's mental retardation program comes through a single appropriation to the program as a whole. Pennsylvania's Governor's Executive Budget, 1979-1980 at 47.

The Pennsylvania courts have also recognized that the 1966 Act mandated the creation of a single statewide program:

> The manifest object of the General Assembly in enacting the Mental Health and Mental Retardation

---

[20] Pa. Stat. Ann. tit. 50, §§ 4101-4704 (Purdon 1969). When an individual resides in a state institution, the Commonwealth pays 100% of the costs; however, if the individual resides in the community, the counties must provide 10% of the funds necessary to provide some of the services. 446 F. Supp. 1312. In 1970, Act 256 became law, appropriating $21 million for the purposes of planning, designing and constructing community facilities which would enable 900 Pennhurst residents to be transfered to the community. Eighteen million dollars of this fund remains unspent. As of April 1977, only 37 Pennhurst residents had directly benefited from Act 256. *Id.*

> Act of 1966 was to create a cooperative State-county (or multi-county) program across the Commonwealth for those who suffer mental health or mental retardation afflictions.

Hoolick v. *Retreat State Hospital*, 24 Pa. Commonw. Ct. 218, 224; 354 A.2d 609, 612 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978).

The program has three major subsystems, represented in its state plan as:

> . . . interrelated but not yet fully integrated. These subsystems include: (1) the State Center system; (2) the County MH/MR system; (3) private services for the mentally retarded.

Pennsylvania Developmental Disabilities Plan, 1980 at 191. *See also* Pennsylvania Developmental Disabilities Plan 1979, at 107-109. Pennhurst, a State center is unquestionably an important component of the mental retardation program, as admitted by the petitioners in their brief to this Court: "Institutional care remains an integral part of Pennsylvania's diversified program for the mentally retarded." Pet. Brief, n.2.

B. Pennsylvania's Mental Retardation Program Is "Assisted" Under the DD Act Within the Meaning of Subsection 6063(b)(5)(C).

Having established that the Commonwealth's mental retardation program is a program within the meaning of Subsection 6063(b)(5)(C) and that Pennhurst State Hospital is an integral part of that program, the question becomes whether the program is "assisted" by funds provided under the DD Act.

Examination of the purposes for which federal DD funds were sought by Pennsylvania and provided by the federal government leave no doubt that the Commonwealth's mental retardation program is a program "assisted" under the DD Act. The state's mental retardation program is administered by the state's Office of Mental Retardation, which receives the largest share of the

state's allotment of federal funds each year. These funds are used to defray the administrative costs of designing, securing and assessing services, including those provided through the state's mental retardation program (see Pennsylvania Developmental Disabilities Plan 1979 at 376 and Pennsylvania Developmental Disabilities Plan 1980 at 14). Not only did the federal DD funds augment state appropriations for the mental retardation program, the state's program was in fact benefited by the planning and evaluation efforts for which the federal funds were used.

As developmentally disabled individuals receiving services from a participating state through a program assisted under the Act, residents of Pennhurst are undeniably among the citizens whose rights the state obligated itself to protect. Those rights included the right to individualized habiliation plans and appropriate treatment in the least restrictive setting.

III. PENNSYLVANIA AND THE COUNTIES VIOLATED THEIR OBLIGATION TO PROVIDE RESPONDENTS WITH APPROPRIATE HABILITATION WHEN THEY CONFINED THEM IN PENNHURST STATE HOSPITAL.

As part of their obligation to provide appropriate habilitation, petitioners were required to provide competent assessment of respondents' potential for learning and development. Yet the district court found that respondents' needs were never properly assessed.[21]

---

[21] None of Pennhurst's residents had received a complete, individualized assessment as of January 1977; the evaluations that were performed were found to fall below minimum professional standards. 446 F. Supp. 1295, 1305. Although required by both federal and state law to assess the needs of mentally retarded applicants for service, counties also frequently failed to perform competent evaluations. 446 F. Supp. 1295, 1313. They failed to investigate alternatives less restrictive than Pennhurst and routinely placed retarded individuals there. *Id.* Often placement at Pennhurst was the only possibility presented to the judge at court commitment proceedings. *Id.*

In addition, petitioners violated their obligations under Subsections 6063(b)(5)(C) and 6010(1) to actually provide the appropriate habilitation services that respondents were known to need. They provided only Pennhurst. Yet neither the Commonwealth nor the counties took issue with the findings, affirmed by the court of appeals, that Pennhurst was both physically and psychologically dangerous. 446 F. Supp. at 1308; 612 F.2d at 93. The record compiled in the district court vividly documents the deterioration and abuse which Pennhurst residents suffer. The court also specifically found that the programming at Pennhurst fell far below minimum professional standards. 446 F. Supp. at 1308-10. The circuit court found that Pennhurst was unsanitary, stinking, conducive to infectious diseases and excessively noisy. Residents there were subject to staff abuse, self-abuse, drug-abuse and unnecessary isolation as punishment. 612 F.2d at 93. The majority of the Third Circuit found the conditions at Pennhurst "abominable"—the dissent, "deplorable." By no stretch of the imagination could Pennhurst be considered appropriate habilitation. As the court of appeals declared, Pennhurst's operation at the time of the lawsuit was a flagrant violation of its residents' right to appropriate habilitation. 612 F.2d at 108.

IV. RESPONDENTS HAVE A PRIVATE CAUSE OF ACTION TO ENFORCE STATE PLAN REQUIREMENTS BOTH UNDER THE DD ACT AND UNDER 42 U.S.C. § 1983, AS CONSTRUED IN *MAINE* v. *THIBOUTOT*.

A. Respondents Have an Implied Cause of Action Under the DD Act in Accordance With the Criteria Established in *Cort* v. *Ash*.

Using the criteria of *Cort* v. *Ash*, 422 U.S. 66 (1975), established by this Court for the implication of a private cause of action, the DD Act itself can be construed to provide residents of Pennhurst a cause of action to enforce their rights against the state and its counties.

The court of appeals chose not to address the question whether an exercise of spending authority can support a private cause of action. 612 F.2d at 99.[22] Nevertheless, federal courts have recognized for some time the implied right of beneficiaries of federal grant-in-aid programs established pursuant to Congress' spending powers to enforce relevant state plan requirements.[23] Under the four standards of *Cort* v. *Ash*, residents of Pennhurst have an implied cause of action under the DD Act for the enforcement of the rights explicitly granted them by the bill-of-rights section and made enforceable against the states by the Act's state plan requirements.[24]

---

[22] The court of appeals found an implied cause of action under the *Cort* v. *Ash* criteria regarding the bill-of-rights provisions of the DD Act as exercises of Congress' authority under Clause 5 of the Fourteenth Amendment. For the reasons stated herein a private cause of action can also be found regarding the Act as an exercise of spending authority.

[23] *See, e.g., Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969); *Euresti* v. *Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Saine* v. *Hospital Authority of Hall County*, 502 F.2d 1033 (5th Cir. 1974); *NYC Coalition for Community Health* v. *Lindsay*, 362 F. Supp. 434 (S.D.N.Y. 1973). *See also Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Bossier Parish School Bd.* v. *Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *Corum* v. *Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973); *Cook* v. *Ochsner Foundation Hosp.*, 319 F. Supp. 603 (E.D. La. 1970).

[24] First, as discussed in section I. above, residents of state-run institutions can legitimately claim that Congress intended to benefit them specifically by requiring states receiving DD funds to protect the rights expressly granted such residents by the bill of rights.

Second, the legislative history of the DD Act does not indicate that Congress intended to foreclose private enforcement of the rights it created. Nor, for the reasons stated in subsection C below, does it show that Congress intended enforcement of state obligations by the Secretary of HHS to be the exclusive means of enforcing the Act.

Third, private enforcement is consistent with and furthers the purposes of the Act for the reasons set forth in Section I above.

B. 42 U.S.C. § 1983 Provides a Remedy for the Enforcement of Rights Secured by the DD Act.

Even if respondents did not have a private cause of action under the DD Act directly, they have a cause of action under 42 U.S.C. § 1983. As this Court has recently recognized, Section 1983 provides a remedy for the enforcement of rights secured by laws of the United States as well as of rights secured by the Constitution. *Maine* v. *Thiboutot*, —— U.S. ——, 100 S. Ct. 2502 (1980). The question before the Court, then, is: Are the rights created by the DD Act "rights . . . secured by laws" of the United States within the meaning of Section 1983?

While the full scope of the meaning of that phrase in Section 1983 may not be clear, it must include individual rights which are both expressly granted by Congress and which are also of the same kind as those enforced in the *Thiboutot* case. In that case, the plaintiffs were welfare recipients who were entitled to certain monetary benefits from the state under the federal Social Security Act. Like the DD Act, the Social Security Act's Aid to Families with Dependent Children program is a federal-state grant-in-aid program. Beneficiaries of the program sought to enforce the state plan requirements against the State of Maine and were held to have a cause of action to do so under Section 1983. A majority of this Court made clear in *Thiboutot* that Section 1983 was the exclusive statutory cause of action, available to the plaintiffs in that case because there is no private

---

As providers and consumers of essential habilitation services, *amici* concur that the special vigilance and unique interest of the direct beneficiaries of the Act are essential to the effective implementation of a system of appropriate services.

Fourth, the right to receive appropriate habilitation in the least restrictive setting is not a right traditionally relegated to state law. Rather, it is a newly recognized right which a federal statute requires the states to protect if they are to receive certain federal funds. Accordingly, all of the criteria established by this Court for the implication of a private right of action are met with respect to the DD Act.

right of action against the state under the Social Security Act. *Maine* v. *Thiboutot*, 100 S. Ct. at 2506.

In determining what rights are secured by the laws of the United States for the purposes of Section 1983, the phrase should be interpreted to encompass those rights which, like those granted under the Social Security Act, are based on state obligations to operate federally assisted programs in a manner which directly benefits claimants of the right. As discussed above, the DD Act is such a law and the state's obligations are clearly provided in Subsection 6063(b)(5)(C) of the Act. Furthermore, any doubt that Congress intended to create enforceable private rights of beneficiaries is dispelled by the plain language in Section 6010 of the DD Act, absent in the Social Security Act, expressly recognizing such rights.[25]

C. Congress Did Not Intend Federal Fund Cut-Offs for Noncompliance With State Plan Requirements to Be the Exclusive Means of Enforcing Obligations Under the Act.

Petitioners contend that the ruling in *Maine* v. *Thiboutot* should not apply in this case because Congress intended the provisions permitting the Secretary of HHS to cut off federal funds to be the exclusive mechanism for enforcement of state obligations under the DD Act. Pet. Brief, at 28-34. But as set forth below, petitioners have misread or misstated the intent of Congress. Furthermore, in *Maine* v. *Thiboutot*, the Court did not find that similar mechanisms for enforcement by the Secretary of HHS were exclusive or precluded the recognition of a

---

[25] As noted in the majority opinion in *Maine* v. *Thiboutot*, an action under section 1983 is supported by federal question jurisdiction under 28 U.S.C. § 1331. —— U.S. ——, 100 S. Ct. 2502, 2504 n.6. In this case, the jurisdictional amount of $10,000 is more than met by the fact that the cost of caring for each resident at Pennhurst is $21,000 a year (446 F. Supp. at 1312)—funds respondents claim the DD Act requires be used to provide them appropriate habilitation.

private cause of action under Section 1983 to enforce state plan requirements. This Court in *Regents of University of California* v. *Bakke*, 438 U.S. 265, 420 n.26 (1970) stated:

> The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. *See Rosado* v. *Wyman*, 397 U.S. 397, 420.

The enforcement mechanism in the DD Act (42 U.S.C. § 6065; 45 CFR §§ 1386.80 *et seq.*) cannot have been intended as the exclusive method for the enforcement of individual rights granted to beneficiaries by the Act, for it fails to provide any remedy for the infringement of individual rights which do not constitute substantial noncompliance for the state as a whole.

As this Court observed in *Cannon* v. *University of Chicago*, 441 U.S. 677 n.42 (1979), in connection with enforcement of rights under Title IX of the Civil Rights Act, "[a]s a special matter HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries." Petitioners clearly misunderstand the nature of enforcing state compliance with DD requirements; it is not simply a matter of paper submissions, but involves the difficult task of overseeing the performance of the many facilities and agencies responsible for delivering services to developmentally disabled people. Therefore, individual enforcement mechanisms are as crucial here as those found necessary to assure Title IX rights.

In fact, Congress recognized in 1975 that the rights it granted would be individually enforced. Both the Conference Report and debate on the bill-of-rights provisions indicate that the Congress expected the newly recognized rights to be enforced in the courts:

> [T]he developmentally disabled . . . have a right to receive appropriate treatment for the conditions for

> which they are institutionalized, and that this *right should be protected and assured* by the Congress *and the courts.*

H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. Code Cong. & Ad. News 961 (emphasis added).

Again, during debate on the 1978 amendments, members of Congress emphasized that the rights set forth in Section 6010 were enforceable:

> Everyone in here knows that the only way that change is going to be brought about [in institutions like Willowbrook and Forest Haven] is the long, difficult, persistent, and dedicated advocacy of those who are prepared to follow through administrative hearings, hearings on regulations, *through challenges in the court, for the kinds of rights which are being guaranteed in this legislation.*

124 Cong. Rec. 15,663 (September 21, 1978) (remarks of Senator Kennedy) (emphasis added). The DD Act itself creates protection and advocacy agencies in each state and charges them with the responsibility "to pursue legal remedies to insure the protection of the rights of [developmentally disabled] persons who are receiving treatment, services or habilitation within the State." Section 6012(a).

Enforcement mechanisms similar to those set forth explicitly in the DD Act, including noncompliance hearings by federal agencies and the cut-off of federal funds, have been provided in the Hill-Burton statute, 42 U.S.C. § 291g; the Wagner-Peyser National Employment System Act, 29 U.S.C. § 49h; Title IX of the Civil Rights Act, 20 U.S.C. § 1682, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Exec. Order No. 11914 (April 28, 1976). But the existence of those parallel enforcement mechanisms has not precluded the implication of private rights of action under those Acts. *Cook* v. *Ochsner Foundation Hosp.*, 319 F. Supp. 603 (E.D. La. 1970); *Gomez* v. *Florida State Employment*

Service, 417 F.2d 569 (5th Cir. 1969); *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979); *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977). More importantly, similar enforcement provisions in the Social Security Act, 42 U.S.C. 604, did not prevent this Court in *Thiboutot* from recognizing a private right under 42 U.S.C. § 1983 to enforce state obligations under that Act.

Not having the benefit of this Courts' opinion in *Maine* v. *Thiboutot*, the court of appeals below held that respondents have an implied cause of action under the DD Act for enforcement of the rights granted them by the bill of rights. *Amici* urge the Court to affirm that holding or hold that respondents have a cause of action under Section 1983 for the enforcement of these rights.[26]

---

[26] The court of appeals made clear that it expected the Commonwealth and the counties to provide each respondent with a competent evaluation of his or her needs. 612 F.2d at 112, 115 and 116. The district court or its appointed master is to review the counties' professional determinations to find whether an improved Pennhurst is the only appropriate placement for persons designated to be placed or retained there. *Id.* at 114. In performing that review, the court is to engage a presumption in favor of placing individuals in community living arrangements. *Id.* at 115. *Amici* believe that enforcement of the petitioners' obligation to provide respondents competent professional evaluations and adequate habilitation program plans is proper.

Furthermore, because it has not yet been determined whether each respondent's right to appropriate habilitation in the least restrictive setting is being violated by petitioners, it is proper to provide for judicial review of these professional assessments in this litigation. In *Parham* v. *J.L.*, 442 U.S. 584 (1979), this Court ordered similar relief. Because, on the record of that case, this Court could not decide if every child in the class had been accorded minimal due process, including an adequate independent diagnosis of emotional condition and of need for confinement under established standards, the case was remanded to the district court to consider whether individual admissions had met the standards established in the opinion. *Id.* at 617.

It is *amici's* position that while violation of the prohibitions of Section 6010(3) may be enforced by termination of state and fed-

CONCLUSION

For the reasons stated, *amici* respectfully urge the Court to affirm the order of the Court of Appeals and hold that residents of Pennhurst State Hospital, as developmentally disabled people receiving services in a program assisted under the DD Act, have a legally enforceable right under the Act to receive appropriate habilitation services in a setting least restrictive of their civil liberties and that the Commonwealth of Pennsylvania and its counties, having accepting funds under the Act, are obligated to provide those services.

Respectfully submitted,

MARGARET F. EWING
PAUL R. FRIEDMAN
Mental Health Law Project
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Amici Curiae *

---

eral funding, a violation of Subsection 6063(b)(5)(C) must be rectified by an injunction to specifically enforce the state's affirmative obligations. *See* cases note 23 *supra*; *see also Cannon* v. *University of Chicago*, 441 U.S. 667 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 420 n.26 (1978); *Thiboutot* v. *Maine*, 405 A.2d 230, 232 (S. Jud. Ct. Me.), *aff'd* —— U.S. ——, 100 S. Ct. 2502 (1980).

* Counsel for *amici* gratefully acknowledge the invaluable assistance of Alisa G. Field, Legal Intern, Mental Health Law Project.

CERTIFICATION OF SERVICE

I, Margaret F. Ewing, hereby certify that on October 20, 1980, I served by mail one copy of the foregoing Brief for Amici Curiae on David Ferleger, 2321 Sansom Street, Philadelphia, Pa., 19103; Thomas Gilhool, 1315 Walnut Street, Philadelphia, Pa., 19107, and Wade McCree, Solicitor General of the United States, 10th and Constitution Avenues, N.W., Washington, D.C., 20001, Counsel for Respondents, and on Harvey Bartle, III, 16th Floor, Strawberry Square, Harrisburg, Pa., 17120; Alan J. Davis, Suite 1520, Municipal Services Building, Philadelphia, Pa., 19107; Thomas Kittredge, 2107 The Fidelity Building, Philadelphia, Pa., 19109; and Joel I. Klein, 1730 Rhode Island Ave., N.W., Washington, D.C. 20036, Counsel for Petitioners.

MARGARET F. EWING